

Attorney Docket No. 7751 T 002

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

**In re the matter of Registration
Nos. 2,865,908 and 2,863,952
for the marks “FUNKY MUNKY”**

Johnny Ray Company, Inc.,

Petitioner,

V.

Funky Munky, Inc.
(formerly, Jodi Galle),

Registrant.

Cancellation No. 92044628

ANSWER TO PETITION TO CANCEL

Box TTAB
Commissioner of Trademarks
P.O. Box 1451
ALEXANDRIA, VA 22313-1451

Registrant, Funky Munky, Inc., formerly Jodi Galle, by its undersigned attorneys,
answers the above-identified Petition to Cancel as follows:

The above-identified Petitioner believes that it will be damaged by the above-identified registrations because Petitioner has been utilizing the mark FUNKY MONKEY since October 1994 to identify and promote its retail stores featuring apparel and other merchandise. Therefore, Petitioner hereby petitions to cancel the two FUNKY MUNKY marks identified above.

ANSWER:

Registrant denies Petitioner will be damaged by the continued registration of U.S. Registration Nos. 2,865,908 and 2,863,952 for the marks FUNKY MUNKY and FUNKY MUNKY (Stylized). Registrant is without information or knowledge sufficient to form a belief as to the truth or falsity of the remaining allegations contained in the Preamble to the Petition to Cancel, and therefore denies the same.



07-28-2005

U.S. Patent & TMO/c/TM Mail Rcpt Dt. #72

In re the matter of Registration
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The grounds for cancellation are as follows:

1. Petitioner has used the mark FUNKY MONKEY to identify and promote its retail stores featuring apparel and other merchandise. The mark was first used by the Petitioner in October 1994 and also was first used in interstate commerce by the Petitioner in October 1994. The mark has since and continues to be so used in interstate commerce. An invoice reflecting Petitioner's use of the mark dated December 3, 1994 is attached as Exhibit A.

ANSWER:

Registrant is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in Paragraph 1, and therefore denies the same.

2. On January 28, 2004, Petitioner filed an application with the United States Patent and Trademark Office to register its mark for "[r]etail variety stores; retail stores featuring miscellaneous general merchandise." A copy of the application is attached hereto as Exhibit B.

ANSWER:

Registrant admits a copy of an application is attached as Exhibit B. Registrant is without knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations in Paragraph 2, and therefore denies the same.

3. An Office Action dated September 3, 2004 was apparently transmitted to Petitioner's counsel on that date, but it was never received. Petitioner and Petitioner's counsel learned of the Office Action through an Abandonment Notice transmitted April 12, 2005. The Office Action notified Petitioner that its application for registration had been rejected under Trademark Act section 2(d), 15 U.S.C. section 1052(d), "because the applicant's mark, when used on or in connection with the identified services, so resembles the marks in U.S. Registration No. 2865908 and 2863952 as to be likely to cause confusion, to cause mistake, or to deceive." A copy of the Office Action is attached hereto as Exhibit C.

ANSWER:

Registrant admits a copy of an Office Action is attached as Exhibit C. Registrant is without information or knowledge sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 3, and therefore denies the same.

4. Petitioner first used the mark FUNKY MONKEY in October 1994 and has used the mark continuously in interstate commerce since that date. Registrant, according to its applications for registration, first used the mark Registration No. 2865908 in January 1995 and first used the mark Registration No. 2863952 in December 1996. Accordingly, Petitioner's rights in its mark are superior to Registrant's rights.

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ANSWER:

Registrant admits the dates of first use listed in U.S. Registration Nos. 2865908 and 2863952 are January 1995 and December 1996, respectively. Registrant denies that it first used the mark shown in Registration No. 2,865,908 in January, 1995. Registrant is without information or knowledge sufficient to form a belief as to the truth or falsity of the remaining allegations contained in Paragraph 4, and therefore denies the same.

Any allegations not specifically admitted, are hereby denied.

AFFIRMATIVE DEFENSES

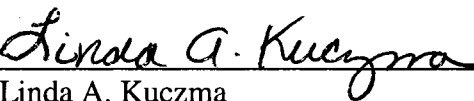
1. Registrant further alleges that Petitioner's Petition to Cancel fails to state a claim upon which relief can be granted and therefore should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6).
2. Registrant affirmatively alleges that Petitioner's Petition to Cancel fails to state a claim because Petitioner has not used the FUNKY MONKEY mark as a service mark prior to Registrant's use of the mark FUNKY MUNKY.
3. On information and belief, Registrant alleges that Petitioner's application contains fraudulent statements and should be refused registration.
4. On information and belief, Registrant alleges that Petitioner's application contains fraudulent statements warranting the dismissal of the Petition for Cancellation.
5. Alternatively, Registrant affirmatively alleges that Petitioner will not be damaged by the continued registration of Registrant's FUNKY MUNKY marks.

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WHEREFORE, Registrant, Funky Munk, Inc., prays that Petitioner's Petition to Cancel
U.S. Registration Nos. 2,865,908 and 2,863,952 for FUNKY MUNKY be dismissed.

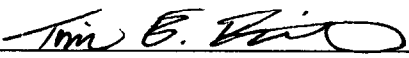
Respectfully submitted,
FUNKY MUNKY, INC.

Date: July 26, 2005

By: 
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CERTIFICATE OF MAILING (37 C.F.R. § 2.197)

I hereby certify that this document is being deposited with the United States Postal Service as first class mail, postage prepaid, in an envelope addressed to: Box TTAB, Commissioner For Trademarks, P.O. Box 1451, Alexandria, VA 22313-1451 on July 26, 2005.


Tim E. Fiester 228407v1

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **ANSWER TO PETITION TO CANCEL**
was mailed via first class mail, postage pre-paid, on this date to counsel for Petitioner as follows:

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Date: July 26, 2005